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The Media Institute

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October 13, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: Carriage of the Transmissions of Digital Television Broadcast Stations,
Amendments to Part 76 of the Commission's Rules
CS Docket No. 98-120
Notice of Proposed Rule Making

To the Secretary:

Enclosed please find comments of The Media Institute in the above proceeding.

We have enclosed an original and nine copies so that each commissioner can receive a copy. Thank you.

Sincerely,



Richard T. Kaplar
Vice President

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CS Docket No. 98-120
Notice of Proposed Rule Making

To the Commission:

The Media Institute hereby responds to the Federal Communications Commission's request for comments in the above proceeding regarding cable carriage of digital television signals. The Media Institute is a nonprofit research foundation specializing in First Amendment and communications policy issues. Since its inception in 1979 the Institute has championed freedom of speech and press with an emphasis on the First Amendment rights of media speakers.

In agency and court proceedings dating from the mid-1980s, The Media Institute has defended the First Amendment rights of various media including broadcasters, cable operators, and publishers. As cable television expanded rapidly in the 1980s, the Institute took the then-novel position that the speech of cable operators should enjoy full constitutional protection.

On several occasions, including an *amicus* brief in *Turner Broadcasting*,¹ the Institute has stated its belief that must carry rules in the analog environment violate the First Amendment rights of cable operators by compelling them to carry the speech of broadcasters they might otherwise choose not to carry. The rules may also adversely affect other First Amendment interests by displacing some cable programmers that the public might wish to see more than the broadcast stations put in their place.

Thus our comments here will be limited to the First Amendment implications of must carry in the approaching transition from analog to digital broadcasting. Given the uncharted and uncertain course of digital conversion, our comments will be more cautionary than prescriptive in nature.

In the opening paragraph of the Notice, the Commission states its desire to effect a structure that, among other things, "respects the First Amendment rights of all participants as established by court precedent." This sentiment sounds well intentioned and principled, but upon closer scrutiny seems to offer little hope of enhanced constitutional protection for

¹ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*").

either cable operators or broadcasters. In *Turner I*² and again in *Turner II*³ the Supreme Court ruled that must carry provisions for analog broadcast signals were not an unconstitutional burden on cable operators.

Meanwhile, however, these rulings did nothing to strengthen the First Amendment rights of broadcasters; the governmental interest in mandating compelled carriage was three-fold: preserving the economic viability of over-the-air local television, promoting source diversity, and promoting fair competition -- not the enhancement of broadcasters' free-speech rights. In general, of course, broadcast television historically has labored under far less constitutional protection than print as articulated in a host of well-known Supreme Court rulings including *NBC*⁴ and *Red Lion*.⁵

It would be easy to downplay First Amendment concerns in light of *Turner I* and *Turner II*, since it appears the Supreme Court has settled the matter of must carry's constitutionality. Indeed the Commission seems to have adopted this approach, since the 108-paragraph NPRM does not mention the First Amendment or constitutional concerns again after paragraph 15.

We would, however, caution against such an approach. In *Turner II* the Supreme Court decided in favor of must carry by the narrowest 5-4 margin. Justices Ginsburg, O'Connor, Scalia, and Thomas thought the rules content specific and thus subject to strict scrutiny. Even Justice Breyer, who voted to uphold must carry as a means of subsidizing weaker broadcast stations to maintain diversity, noted that must carry "extracts a serious First Amendment price.... This 'price' amounts to 'suppression of speech.'"⁶

Virtually any action the Commission takes regarding digital must carry will be subject to a court challenge. Thus we urge the Commission to review carefully *Turner I* and *Turner II* because the Court was hardly unanimous in its view of content neutrality and its thinking was influenced heavily by the economic and competitive exigencies of the analog environment. Moreover, the Court's decisions were based heavily on unusually specific findings by Congress in the 1992 Cable Act. In this technologically and economically dynamic industry the world has changed significantly since then, as even the FCC has acknowledged in this Notice. In short, there is no guarantee that *Turner II* will sustain a must carry regulatory scheme for digital broadcast signals.

This seems particularly true in the case of multiplexing, or the transmission of multiple signals by one broadcaster. If, as the cable industry maintains, the majority of cable systems do not have the capacity to add new channels, and if the Commission desires to maintain some type of must carry scheme, it is obvious that criteria will have to be developed to determine carriage versus non-carriage for certain channels. Such criteria might well be content specific and thus invite strict scrutiny. Virtually *any* criteria, however, would be at least as content specific as those opposed by the dissenting justices in *Turner II*. Even a scheme in which a broadcaster's primary signal is subject to must

² *Id.*

³ *Turner Broadcasting System, Inc. v. FCC*, 117 S. Ct. 1174 (1997) ("*Turner II*").

⁴ *NBC v. United States*, 319 U.S. 190 (1943).

⁵ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

⁶ *Turner II*, slip op. at 2 (Breyer, J., concurring in part).

carry, but its multiplexed signals are not, would raise the constitutional stakes in a way not seen in the analog world of *Turner II*.

To date the analog must carry rules probably have not changed the complexion of the television industry that drastically (with some exceptions around the fringes, perhaps). Likewise, we expect that both cable and broadcasting will survive the outcome of this proceeding, especially since must carry is but one of many variables affecting the conversion to digital broadcasting.

Survival notwithstanding, however, we are left with two important First Amendment concerns. First is an immediate concern for the free-speech rights of the media speakers involved and the level of constitutional protection they will be afforded. In this age of media abundance The Media Institute believes that an expansive approach to First Amendment rights, together with a minimalist approach to government regulation, best serves the public interest.

Second, and of long-term consequence, is the judicial precedent bound to be established eventually regarding the scope of First Amendment guarantees afforded cable and broadcasting. We suspect that the peculiar features of digital broadcasting (such as multiplexing) will take the courts back to square one in their consideration of must carry's constitutionality. We would fully expect *Turner II* to be replaced by a new precedent that could have broader implications for the constitutional status of cable and broadcasting, and that would likely be brought to bear in other First Amendment venues, for years to come.

How that process evolves will depend in significant measure on the action the FCC takes now. We urge the FCC to begin by carefully reexamining the empirical basis for must carry. In particular, since *Turner* depends heavily on the "gatekeeper" power of cable operators, the Commission should critically examine the over-the-air availability of digital broadcasts. We cannot stress enough that *Turner II* is not the bedrock on which to build an expanded structure of must carry requirements.

In its consideration of digital must carry rules, the Commission would be well advised to treat the inherent First Amendment issues seriously, and to treat them *de novo* without the false sense of security that *Turner II* may impart. A cautious and careful First Amendment approach by the Commission at this early stage may be reflected in a judicial precedent years hence that yields significant gains in constitutional protection, not only for the media speakers involved but for others who may benefit from its precedential value.

Respectfully submitted,



Patrick D. Maines
President



Richard T. Kaplar
Vice President